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OCT 27 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners*,

vs.

TRUCKING UNLIMITED, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR LANDMARKS HOLDING CORPORATION, ET AL., AS *AMICI CURIAE*

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Dated October 28, 1971

THE COLUMBIA PRINTING CO., HAMDEN, CONNECTICUT

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The above-named individuals and corporation hereby respectfully move for leave to file a brief annexed hereto, as *amici curiae*, in this case. Applicants requested the consent of Petitioners and Respondents to file a brief as *amici curiae*. Respondents, Trucking Unlimited, et al., granted their consent. Petitioners refused their consent.

The case now before this Court will almost certainly control the outcome of a private, treble damage antitrust action in which Applicants are plaintiffs. Applicants' case involves many of the same basic issues as those presented by the case now before this Court. There are, however, significant differences between applicants' case and this one, and applicants rest their motion for leave to file a brief as *amici curiae* upon the differences between the cases as well as their similarities. We wish to present arguments and viewpoints on the basic issues which the parties themselves will probably not present.

The present case poses issues of enormous importance for the future of antitrust policy. This Court's resolution of those issues may lay down the guidelines for a developing field of law. What is at stake is the ability of conspirators or would-be monopolists to abuse governmental processes in order to destroy competitors or create artificial barriers to their entry into concentrated markets. The present case displays one variety of such an attempt, but there are many others, some in litigation but most not. The parties to this case will necessarily focus upon the allegations of Respondents' complaint. Applicants believe that it will be of assistance to this Court, in framing the general guidelines that will control the development of this entire field of law, to have before it a discussion of other types of cases involving the abuse of governmental processes for anti-competitive purposes. Indeed, one of the precedents central to this and many other similar controversies, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), itself stresses the importance to governmental decision makers of a flow of information and views provided by persons with an interest in the outcome of the proceedings. Applicants hope to serve that function here. We respectfully suggest that such a function is particularly appropriate in a landmark case such as this promises to be, for, as this Court noted in *White Motor*

Co. v. *United States*, 372 U.S. 253 (1963), the framing of general rules in a limited factual context is inevitably a delicate and troublesome problem. A brief by *amici curiae*, if more general than those filed by the immediate parties, can assist in this task by adding to the views and information presented.

Applicants are plaintiffs in *Landmarks Holding Corporation et al.* v. *Hamden Mart, Inc., et al.*, a Sherman Act treble damage action now pending in the United States District Court for the District of Connecticut. Should this Court render an opinion in the case now before it applying generally to attempts to abuse governmental processes in order to stifle competition, that opinion would almost certainly control the outcome of Applicants' litigation. Applicants' complaint, based upon Sections 1 and 2 of the Sherman Act, alleges that Applicants are attempting to have land in Hamden, Connecticut rezoned so that it may be used for a regional shopping center instead of light industry. Applicants, who own the land, will own a one-half interest in this regional shopping center and receive one-half its net revenues.

Applicants allege in their complaint that two nearby shopping centers have restrained and monopolized trade by abusing the processes of the Connecticut Courts and of the Hamden Planning and Zoning Commission in an effort to defeat Applicants' entry into their market area. The defendant shopping centers are of the outmoded "strip" type while Applicants and their partner intend to erect and operate a center containing three major department stores and a two-level, fully-enclosed, air-conditioned, modern shopping mall. The defendant shopping centers, aware that Applicants' shopping center would be a formidable rival, have abused and continue to abuse the processes of the courts and zoning boards to delay the appearance of competition.

The Town of Hamden endorses Applicants' plans to establish a regional shopping center because of its beneficial effect upon employment in the area and the additional tax revenue it would provide. The Hamden zoning board first ruled against the zone reclassification and then ruled in favor of it. Defendant shopping centers have appealed the zoning board's determination to the state courts. Applicants' complaint alleges that the defendant shopping centers took this appeal, and other appeals from related administrative determinations, well knowing that they had no lawful right to appeal or, indeed, to oppose the zone reclassification before the zoning board. The complaint further alleges that the defendant shopping centers supported, directed, and subsidized residents of Hamden in oppositions to the zone reclassification before the zoning board and in appeals to the Connecticut courts from decisions favorable to Applicants. The complaint makes certain of these citizens defendants because they knowingly became the instruments of an illegal conspiracy but asks no relief against them other than that they stop receiving subsidies from the defendant shopping centers. Applicants allege that the defendant shopping centers took these and other actions solely to prevent competition, raise Applicants' costs, inflict direct injury upon them, and harass, delay, and defeat them in their effort to compete with defendant shopping centers.

Applicants' case is thus parallel in many respects to the case now before this Court, but there are significant differences between the two. A major difference is that the administrative tribunals involved in the present case had some responsibility to determine the desirable amount of competition in trucking. No governmental body involved in Applicants' case had any such responsibility or authority. Neither the zoning board nor the Connecticut courts is empowered to consider competition. In fact, Connecticut law clearly for-

bids the consideration of that factor in zoning determinations. If Applicants are ultimately defeated in their efforts to compete by the stratagems of the defendant shopping centers, it will not be because any governmental agency has decided that competition is undesirable. It will be entirely because processes designed for other purposes have been abused, because a sham litigation has delayed Applicants until their contracts lapse and the project has become too expensive to be commercially feasible.

Applicants' predicament is by no means unique. Zoning processes are regularly abused by persons who would restrain competition at the expense of consumers. In fact, Applicants allege and expect to be able to show that defendants in their case have made a regular practice of misusing zoning processes for this purpose, both in the shopping center business and in other industries. Applicants' case is the first we know of that attempts to prevent the deliberate infliction of delay and expense through sham oppositions and appeals by applying the federal antitrust laws. We do know, however, that a case is pending under the common law of the State of New York attempting to recover for the sham use of zoning procedures to preclude new competition in motion picture exhibition. Other governmental agencies are also often misused. The full extent of these low visibility monopolizations in local and regional markets has yet to come to light, but the spate of litigation in lower courts, as shown by the cases cited in the briefs filed by Petitioners and Respondents, begins to suggest the seriousness of the problem. A wide variety of governmental agencies are misused by a wide variety of techniques.

Wherefore, the Applicants respectfully pray that they be accorded permission to file a brief *amici curiae* in order to present arguments and viewpoints on the matters involved

in this case which the parties themselves will probably not present.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the Court of Appeals (Jt. App. 46-59), together with the dissenting opinion of Circuit Judge Hamlin (Jt. App. 60, 61), is reported at 432 F.2d 755 (1970).

The opinion of the District Court (Jt. App. 22-43) is reported at 1967 Trade Cas. ¶72,298 (N.D. Cal. 1967).

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1970 (Jt. App. 62). On December 22, 1970, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to February 18, 1971 (Jt. App. 63). On February 9, 1971, by order of Mr. Justice Douglas, the time within which to file a petition for a writ of certiorari was further extended to March 4, 1971 (Jt. App. 64). The petition was filed March 4, 1971, and was granted June 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Under what circumstances are conspirators or would-be monopolists liable under the Sherman Act for abusing governmental processes in order to stifle competition by inflicting injury upon competitors?

INTEREST OF THE *AMICI*

Amici are businessmen and a corporation who separately engage in a wide variety of business activities. They have come together as partners in an effort to establish a regional shopping center on land they own in Hamden, Connecticut. They have entered into an agreement with The May Shopping Centers, Inc., to construct the shopping center, and *amici* will be one-half owners and receive one-half of the net revenues.

Amici are plaintiffs in an action laid under the Sherman Act which alleges that their efforts to establish a shopping center have been made more expensive, and may be defeated

by delay wrongfully inflicted upon them through competitive shopping centers' misuse of the Connecticut courts and of a local zoning board. The Complaint alleges that the competitive shopping centers' opposition in these tribunals has been a sham, clearly without legal basis, and intended solely to delay *amici's* entry into the market.

Amici are vitally interested in their freedom to operate their business and to compete freely. They have no objection to any valid governmental regulations that control or inhibit their right to compete. But they believe it essential that governmental processes designed for other purposes not be abused by sham actions whose sole purpose is to suppress competition.

STATEMENT

The pleadings and lower-court proceedings are detailed in the briefs of the parties, and we restrict ourselves here to a summary statement.

Respondents, plaintiffs below, filed a complaint under Section 2 of the Sherman Act on May 6, 1966, in the federal District Court for the Northern District of California. The complaint was amended on February 20, 1967. Petitioners, defendants below, filed a motion to dismiss on the ground that their alleged conduct was immunized by the *Noerr-Pennington* doctrine. The District Court granted the motion on October 5, 1970, the Court of Appeals for the Ninth Circuit reversed, holding by a 2 to 1 vote that Respondents' complaint stated a valid claim for relief under the Sherman Act.

Respondents are fifteen trucking firms operating in the State of California. Petitioners are nineteen of the largest trucking firms in the state. Respondents' complaint alleges that Petitioners, discomfited by the increasing competition of smaller truckers, entered into a combination and conspiracy

to inhibit and deter that competition. They banded together to create a joint trust fund that would be used to oppose all applications for operating rights by smaller trucking firms. That opposition was to be pursued before all available courts as well as before the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC). Petitioners agreed to pursue their oppositions regardless of the merits of any application and regardless of the absence of any basis for opposition. To complete the intended terroristic effect of their scheme, Petitioners warned the smaller truckers that they had put this plan in operation and that the smaller truckers could avoid the costs that would be inflicted upon them only by henceforward refraining from asking for operating rights.

SUMMARY OF ARGUMENT

The complaint in this case alleges one of the most dangerous and increasingly frequent forms of business predation: the deliberate abuse of governmental procedures by conspirators for the purpose of suppressing the competition of smaller rivals. The criteria established by this Court will determine the effectiveness of antitrust policy for very important segments of the economy.

Respondents' complaint, we believe, clearly states a valid claim for relief under the Sherman Act. The decision of the Court of Appeals for the Ninth Circuit should, therefore, be affirmed and the case returned to the District Court for trial.

Because their motion to dismiss necessarily admits all the facts pleaded, Petitioners' argument here and below has been that constitutional considerations give them immunity from antitrust liability for a blatant attempt to suppress the rivalry of smaller trucking firms. There is no doubt that otherwise Respondents' complaint accuses Petitioners of the requisite

power, intention to exclude competitors, and predatory acts to constitute the clearest violation of Section 2 of the Sherman Act.

The controlling precedent, we believe, is *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which this Court attached Sherman Act liability to a business predator who knowingly asserted a false patent claim in the courts in order to drive rivals from the field it coveted. Petitioners, according to the complaint, have similarly agreed to, and have, asserted baseless oppositions to smaller trucking companies' applications for operating rights. These baseless oppositions occurred before regulatory tribunals and before courts. In all important respects, the parallel between this case and the *Walker Process Equipment* case is exact.

Petitioners attempt to avoid the force of this argument, and thus to avoid a trial upon the merits of Respondents' claim, by claiming an immunity for their predation under *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). These cases created an immunity from Sherman Act liability, indeed from any legal liability, for those who attempt by a political campaign to influence elected representatives to pass legislation favorable to their interests or who seek to have executive officers take decisions within their lawful discretion. While we believe those decisions to be plainly correct, we also think them clearly irrelevant to the case framed by Respondents' complaint.

This case does not involve Sherman Act liability alone. The *Noerr* and *Pennington* decisions rest upon general constitutional and policy considerations. The immunity they recognize, where it applies, bars all governmental regulation. It is quite clear that some attempts to use the processes of

government are constitutionally protected. No legislature, for example, could make it criminal for citizens peaceably to petiton government for relief of any grievance. But it is equally clear that some attempts to use the processes of government for private gain may be punished, and indeed must be punished if the integrity of those processes is to be preserved. It is imperative, for example, that courts have the power to punish for deliberate perjury or the knowing assertion of baseless claims and that legislatures have the power to prohibit perjury before their investigative committees.

Between these extremes of propriety and impropriety in the use of governmental procedures lies a long spectrum. Our analysis convinces us that no single, sharp dividing line can be drawn separating the licit from the illicit. The spectrum presented by the cases must be calibrated according to several fundamental considerations. We suggest that the following five considerations are appropriate to govern the issue of liability for attempts to use or abuse the processes of government.

(1) *The intent of the parties.* Liability will usually attach only if the parties attempting to use government have a specific intent which would be unlawful in other contexts: e.g., the intent to suppress competition by the destruction or harassment of business rivals.

(2) *The means employed.* Regardless of intent, a party can be held liable only if he employs means to invoke governmental action that are reprehensible: e.g., the knowing use of perjured testimony before an administrative agency; the knowing advancement of baseless claims before a court of law; the bribery of a law enforcement official.

(3) *The character of governmental process by which decisions are made.* Immunity exists when the process is open

and explicitly political, as in the *Noerr* case. But as the process of governmental information gathering and decision becomes more formalized, moves more toward the model of the judicial process, the immunity correspondingly begins to narrow.

(4) *The character of the governmental decision to be made.* Immunity is broadest when the official or governmental body has discretion to act in the field but it narrows and may disappear when the parties charged have influenced an agent of government to act knowingly outside its lawful authority or when the decision-making body's processes are invoked, seemingly for one purpose, but actually merely to inflict injury through expense and delay.

(5) *The degree to which the process and decision focus upon the formulation of general rules or upon the rights and liabilities of particular parties.* Immunity is properly broader when the framing of general rules is the object of any governmental process than when the force of government is to be brought to bear upon specific parties.

ARGUMENT

I.

THE VALIDITY OF RESPONDENTS' COMPLAINT IS CRUCIAL TO AN EFFECTIVE ANTITRUST POLICY

Predation by abuse of judicial and governmental procedures presents an increasingly dangerous threat to competition in America and to the viability of federal antitrust policy. Predation by such means fits precisely within the definition of "monopolizing" intended by the framers of the Sherman Act. When the Judiciary Committee's draft, which became the law, was brought before the Senate a question was raised as to its meaning. Senator Kenna (D., West Virginia) asked

whether Section 2 would punish a man who got all the business in his line "by his own skill and energy, by the propriety of his conduct generally." He was answered in the negative by Senator Edmunds (R., Vermont) and Senator Hoar (R., Massachusetts) who had taken active parts in drafting the bill. 21 Cong. Rec. 3151-3152 (1890).

Senator Hoar told the Senate that monopolizing, the activity made a crime by Section 2, was "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." 21 Cong. Rec. 3152 (1890). Monopolizing, in a word, consists of the use of tactics which preclude a fair test of efficiency in the market place. There could be no more accurate description of the abuse of governmental procedures to prevent a would-be competitor from even reaching the market place.

As new forms of monopolization by predation have appeared this Court has been alert to stamp them out, applying the Sherman Act or related statutes embodying the same policy. Local price wars launched to suppress competition have long been illegal. *Standard Oil Co. (N.J.)* v. *United States*, 221 U.S. 1 (1911); *United States* v. *National Dairy Products Co.*, 372 U.S. 29 (1963) (Section 3 of the Robinson-Patman Act). The law has been similarly strict with group boycotts aimed at injuring or destroying a rival or class of rivals. *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Even a single trader's refusal to sell is within Section 2 of the Sherman Act if it springs from a predatory design. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). It may safely be said that the Sherman Act and related antitrust statutes are capable of discovering and punishing any business conduct which is monopolistic in intent and effect.

A new and peculiarly deadly form of business predation is now rampant and the law is just beginning to catch up with it. In the early years of antitrust policy there were few opportunities for monopolization through misuse of governmental agencies because governmental regulation was not as pervasive as it is today. The last several decades have witnessed an enormous proliferation of regulatory and licensing agencies at every level of government, federal, state, and local. In order to enter the market and vie for the consumers' favor businesses of all types must gain various types of approval from governmental agencies, departments, and officials. Licensing authorities, planning boards, zoning commissions, health departments, building inspectors, public utilities commissions, and many other bodies and officials control and qualify the would-be competitors access to the market place.

The modern profusion of such governmental authorities protects the public in many ways but also offers limitless possibilities for abuse by the sophisticated and powerful. There can be no antitrust objection when a business opposes entry of a rival before an agency charged with determining whether or not additional competition in that area is consistent with the public interest. But there is an antitrust objection when the powerful business puts up a baseless opposition in bad faith for the sole purpose of harassing, delaying, and thereby weakening or destroying his rival. There is all the more objection when businesses combine to lend each other strength in order to put up baseless oppositions to any and all competition. And there is a most acute objection when powerful businesses use governmental agencies that have no responsibility or authority to decide the desirability of competition for the purpose of destroying competition. An established monopolist who, for example, bribed local building inspectors needlessly to harass and delay the construction of a competitor's factory would be misusing governmental procedures to

stifle competition in a way that the antitrust laws prohibit.

As regulation of all types grows, there arises a corresponding need to ensure that it is not used for purposes foreign to its objectives and to frustrate the policy of the antitrust laws. Otherwise, the largest companies possessing the largest cash reserves and the most sophisticated legal counsel can band together and face smaller rivals with the prospect of protracted and expensive litigation as the price of reaching the market. This raises an effective, artificial barrier to entry. The smaller companies, the intended victims, are usually not united or sophisticated. Each knows that it will have to bear alone the heavy costs and inconveniences of litigation. The result, inevitably, is that many will decide not to challenge the combination.

What makes this form of predation particularly insidious is that the tactic has had relatively low antitrust visibility. The enforcement agencies have tended to look for more traditional modes of foreclosure and exclusion. Since much of this predation occurs at local levels through the misuse of state and municipal procedures the victims are often small businesses with very little knowledge of possible antitrust protection. Too often the legally unsophisticated small businessman, faced with opposition before a local court or agency, thinks only of the contest in that arena, not realizing that an obviously sham opposition, as in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), provides him with the basis for an antitrust claim in another forum.

We have, of course, no way of estimating precisely how much competition is crippled or stifled each year through the abuse of governmental processes. The number of cases beginning to arise in this field, and considerable practical experience in various business affairs, leads us to believe that the

aggregate annual loss to consumers must be enormous. It is crucial that antitrust enforcement catch up with this means of monopolization. We cannot believe that it is impotent to do so.

II.

THE SWEEP OF PETITIONERS' CLAIM OF IMMUNITY DEMONSTRATES ITS INVALDITY

The allegations of Respondents' complaint force Petitioners to make an impossibly broad claim of immunity in order to avoid trial. Petitioners, it is alleged, agreed to fight in advance every application for trucking operating rights regardless of the merits of any application or the absence of colorable grounds for opposition. It is, therefore, clear that Petitioners are charged with knowledge that they would be advancing baseless claims before the courts as well as the PUC and the ICC, just as the predator in the *Walker Process Equipment* case knew that it was advancing a baseless patent claim against its rival. War by fraudulent litigation was to be pursued without limit. The complaint, we submit, clearly states a valid claim for relief under the Sherman Act.

Petitioners' brief before this Court claims an extraordinarily broad immunity for their action. They seek antitrust sanctuary on the ingenious theory that their predation was a "political expression" protected by the First Amendment to the Constitution. That characterization of their behavior has at least the merit of boldness if not of candor and plausibility. It is important to realize the full sweep of the immunity they necessarily claim in order to avoid trial on the allegations of the complaint, for it will be seen that an immunity of such scope would be crippling to the legitimate protection by government of its own processes.

Petitioners are charged with the deliberate misuse of judicial and administrative processes for the purpose of inflicting ruinous expense and delay upon smaller rivals. The misuse alleged involves, among other things, an agreement in advance to assert and pursue to the limit baseless oppositions to applications for operating rights. The immunity they claim is, when analyzed, based entirely upon constitutional rights. That means the immunity would not be limited to a sanctuary from Sherman Act liability. No government, federal or state, could in any way regulate their conduct. The ICC and the PUC would themselves be helpless to deny Petitioners a right to be heard in any application proceeding whatsoever. Petitioners' claim of immunity would, it is important to realize, wipe out the law established by this Court in the *Walker Process Equipment* case, erase all state law concerning the tort of malicious litigation, and deny the power of any agency of government to set limits to intervention in judicial or administrative proceedings.

To illustrate the sweep of the claim Petitioners ask this Court to sustain in order to avoid a trial, we shall suppose a parallel case.

Imagine that the largest law firms of a particular state, feeling the pressure of competition from smaller firms and individual practitioners, meet and agree upon a plan like Petitioners'. They establish a joint trust fund fed by monthly contributions based upon their respective gross billings to clients. The firms then send a circular to all law schools in the nation announcing that they intend to oppose every applicant for admission to the bar of that state before the bar examiners, the character and fitness committees, and all reviewing courts, and that they intend to do so regardless of the merits of any individual's case.

The plan would certainly deter young men and women from

seeking to practice law in that state. Can it possibly be true that no state law, judicial order, or committee ruling can interfere with such a course of conduct because it is a "form of political expression" and hence protected by the Fourteenth Amendment's incorporation of the policy of the First Amendment? Could the conspirator law firms gain total immunity by pointing out that in the particular state the bar examiners were entitled to consider, among other things, the number of applicants that it was desirable to admit in any particular year, or that the character and fitness committees could set standards?

A constitutional immunity does not merely affect the application of the Sherman Act, it defeats the application of any governmental power. Petitioners' claim would mean that the state is powerless to forbid the law firms in our hypothetical from fighting every candidate for admission through the courts as well as the committees of the bars, and that the state is impotent to prevent the issuance of threats of protracted litigation to every potential applicant for admission to the bar.

Petitioners are forced to make their claim of immunity so absurdly broad in order to avoid a trial on Respondents' complaint because the features of the case now before this Court are identical to the hypothetical. If it is true that government is powerless to prevent misuses of its processes for ulterior motives in cases such as this, then a very effective way has been discovered to suppress competition with absolute immunity. The sophisticated, powerful, and affluent will be able to prevent the lawful activities of others, even though they secure no official approval, simply by raising the costs of the activities to prohibitive levels.

We shall attempt to show that no case decided by this Court and no constitutional or policy considerations either compel or justify any such immunity.

III.

THIS COURT'S DECISIONS UPHOLD THE VALIDITY OF RESPONDENTS' COMPLAINT

Respondents' complaint alleges a classic attempt to monopolize and monopolization. The allegations disclose a combination and conspiracy involving business predators with the requisite power and intention to exclude competition, and the commission of acts designed and effective to eliminate competition. These are the elements of an offense under Section 2 of the Sherman Act and have been at least since *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). There could be no doubt in any one's mind that the complaint here states a valid claim for relief but for the single fact that the monopolization was made effective through litigation.

Any doubt that might once have been entertained on that ground was laid to rest by this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). That case is precisely analogous to this. There the original plaintiff, Food Machinery, filed suit against Walker for infringement of a patent covering knee action swing diffusers used in aeration equipment for sewage treatment systems. After discovery, Food Machinery moved to dismiss its complaint because the patent had expired, but Walker amended its counterclaim for a declaratory judgment that the patent was invalid to state instead a claim under Section 2 of the Sherman Act. The Sherman Act claim was that Food Machinery had illegally monopolized commerce by maintaining and enforcing a patent obtained by fraud on the Patent Office. Upon Food Machinery's motion to dismiss, both lower courts held that the counterclaim failed to state a claim upon which relief could be granted.

This Court reversed, holding that "the enforcement of a patent procured by fraud on the Patent Office may be viola-

tive of §2 of the Sherman Act provided the other elements necessary to §2 case are present." 382 U.S. at 174. The crux of the case was the knowing assertion of a baseless claim in court for the purpose of injuring a competitor.

Petitioners' brief here attempts to brush the *Walker* case under the rug by treating it as if this Court merely held that a fraud on the Patent Office is illegal. But that is a complete misreading of the case. The significance of the fraud on the Patent Office was quite different. Food Machinery attempted to argue that the counterclaim was based on the wrongful procurement of the patent and, therefore, that Walker was attempting to have the patent cancelled, something only the United States may accomplish by a lawsuit. Justice Clark's opinion for the Court rebutted that argument by showing that the fraud was significant only because it took the case outside the exception to Section 2 liability for those who enforce patents, whether valid or not, in good faith. "While one of [the] elements [of Walker's counterclaim] is the fraudulent procurement of a patent, the action does not directly seek the patent's annulment. The gist of Walker's claim is that since Food Machinery obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of §2 of the Sherman Act, but must answer under that section and §4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim." 382 U.S. at 176. Justice Harlan's concurring opinion stressed that the fraud was important because imposing Sherman Act liability on those who in good faith enforced patents that turned out to be void for some technical reason "might well chill the disclosure of inventions through the obtaining of patents." 382 U.S. at 180.

The significance of the fraud practiced in obtaining the patent was thus twofold. First, Food Machinery tried to use its own fraud defensively, arguing that by relying upon it

Walker was actually suing to annul the patent. Justice Clark's opinion disposed of that contention. Second, the fact of fraud distinguished the case from good faith efforts to enforce patents that turn out to be invalid. The fraud demonstrated, that is, that Food Machinery was pressing a claim in court in order to harass a competitor with full knowledge that the claim was baseless.

The *Walker* decision is thus an antitrust precedent of general applicability. It stands for the proposition that pressing claims known to be without foundation for the purpose of stifling competition is a violation of Section 2 of the Sherman Act, provided that the other elements required are made out.

Petitioners, understandably reluctant to deal with the *Walker* rationale analytically, have instead focussed almost entirely upon two cases that create a zone of immunity from Sherman Act liability, or indeed from any legal liability. These cases are *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Perhaps through carelessness, or perhaps out of their need to claim an impossibly broad immunity, Petitioners say of these cases: "this Court held that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, even though inspired by anti-competitive motives and even though accompanied by a hoped-for or indeed known incidental effect that such activities would produce 'direct injury' to competitioners." (Brief for Petitioners, p. 14)

As Petitioners represent the rationale of *Noerr* and *Pennington*, these cases apparently overrule *Walker*, even though *Walker* is a later decision. Indeed, Petitioners' statement of the law would create an immunity for conspirators who filed false affidavits with a government department or presented perjured testimony to a court. All of these are attempts to "in-

fluence governmental action." We may safely assume that *Noerr* and *Pennington* stand for no such propositions.

We submit that *Noerr* holds that no legal liability may be created for statements made in the course of a political campaign or a petition to a legislature even though the statements are known to be false and are uttered for the purpose of securing legislation that will destroy the business of rivals. *Pennington* holds that no liability attaches to persons who persuade an official to exercise discretion that is lawfully his even though they too seek the destruction of business rivals. Moreover, these holdings are not based upon any intention of Congress, despite Petitioners assertions, but upon considerations rooted in the Constitution and in the necessities of a representative democracy. The rationale of the exceptions defines their scope.

The Sherman Act, the oldest, broadest, and most profound of our antitrust statutes, is framed in extremely general language. It renders unlawful any conspiracy to restrain trade or to monopolize. No exceptions are found in the statute's text and few or none in its legislative history. There is to be found nowhere in the deliberations of the Fifty-first Congress any statement that conspirators or would-be monopolists who acted through government should for that reason go free. Indeed, the ability of combinations to influence governmental authorities was one of the things that worried Senator Sherman. In urging the adoption of his bill he stated: "These combinations already defy or control powerful transportation companies and reach State authorities. They reach out Briarian arms to every part of our country." 21 Cong. Rec. 2460 (1890). If we had to depend upon the statutory language and legislative history alone, the better guess would be that the Sherman Act punishes every deliberate infliction of injury to competition no matter how wrought.

The exception which this Court has created rests upon reasons more profound than the congressional debates of 1890. Mr. Justice Black's opinion for the Court in *Noerr* relies explicitly upon a realistic appreciation of the needs of government that is democratic, representative, and vital.

Noerr involved a Sherman Act claim by 41 Pennsylvania truck operators and their trade association against 24 Eastern railroads, an association of the presidents of those roads, and a public relations firm. The complaint alleged that the railroads had hired the public relations firm, as the opinion put it, "to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." 365 U.S. at 129. The complaint alleged that the campaign was motivated solely by the railroads' desire to injure the truckers and destroy them as competitors in the long-distance freight business, and, further, that the publicity matter was made to appear as the views of independent persons and civic groups although it was produced by the public relations firm and paid for by the railroads. The truckers won a judgment from the trial court (which held that a similar campaign by the truckers did not violate the Sherman Act), and the Court of Appeals for the Third Circuit, one judge dissenting, affirmed.

A unanimous Supreme Court reversed. Mr. Justice Black's opinion for the Court began from the premise, established in *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939), and *Parker* v. *Brown*, 317 U.S. 341 (1943), that "where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to private action, no violation of the Act can be made out." *Eastern Railroad Presi-*

dents Conference v. *Noerr*, 365 U.S. 127, 136 (1961). The premise is unassailable. As Justice Black put it, "These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provisions of the Constitution." *Ibid.*

From this premise it follows ineluctably, given our system of representative government, that attempts to persuade legislatures to adopt or retain particular laws or to persuade executive officers to adopt or retain particular enforcement policies cannot be punished. Of what use is democratic government if the people may not freely make known their desires to their representatives? Thus, Justice Black's opinion noted the "essential dissimilarity" between agreements jointly to seek legislation and law enforcement and agreements traditionally condemned by Section 1 of the Sherman Act. 365 U.S. at 136. The application of the Act was conclusively barred when this element was considered along with two other considerations. The first of these was that the application of the Sherman Act would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137. Representative government, the opinion said, depends upon the ability of the people freely to inform their representatives of their wishes. Secondly, such an application of the statute would raise important constitutional issues, particularly the right to petition protected by the First Amendment. 365 U.S. at 138.

It did not matter, therefore, that the political campaign operated by the railroads employed deception and misrepresentation or that it had the effect of inflicting direct injury upon the truckers. To hold that either of those factors re-

moved the immunity demanded by the theory of representative government would be to cut deeply into the political process and to chill the right of petition.

The *Noerr* case, however, most certainly did not say or imply that *any* attempt to get *any* government official to do *anything* was beyond the reach of the Sherman Act and all other regulatory statutes. Justice Black carefully qualified the immunity by speaking only of "valid" action by "appropriate" branches of government. Those qualifications were built into his premise. And it was essential that they be built in. A realistic appreciation of the needs of government demands both that citizens have great latitude in making their views known and that governmental bodies not be misused to accomplish ends for which they were not designed and over which they have no legitimate authority. Justice Black was not saying, and never would have said, that, for example, a local police department could be used with impugnity to harass one's competitors. The fact that he joined a unanimous Court in the *Walker* case demonstrates conclusively that he, and the other members of this Court who joined in *Noerr*, espoused no such immunity as that claimed by Petitioners. It is one thing to make misrepresentations in the political forum and quite another to make knowing misrepresentations in courts. The difference in outcome between *Walker* and *Noerr* demonstrates this Court's appreciation of that fundamental difference.

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965), which Petitioners seem to view as broadening the *Noerr* immunity, actually held, insofar as it is relevant to the present case, only that antitrust liability does not attach to those who persuade an executive officer of government to take an action clearly within his lawful discretion. The conspirators in Pennington persuaded the Secretary of Labor to establish a minimum wage for employees of contractors selling coal to the

TVA. They also urged TVA officials to curtail spot market purchases, a substantial portion of which were exempt from the minimum wage order. The conspirators were UMW officials and certain large coal producers, and their purpose was to injure smaller coal operators. *Pennington* did not create a blanket immunity for all attempts to influence government officials. Mr. Justice White's opinion suggested one important qualification in stating the rule: "The conduct of the union and the operators did not violate the [Sherman] Act, the action taken to set a minimum wage for government purchases of coal was the act of *a public official who is not claimed to be a co-conspirator* . . ." 381 U.S. at 671. (Emphasis added.)

In fact, this Court, in another opinion by Mr. Justice White, had already refused to apply the *Noerr* immunity when the governmental agent was a member of the conspiracy. The case was *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). Plaintiff Continental brought a private treble damage action under Sections 1 and 2 of the Sherman Act alleging that defendants Vanadium Corporation of America, Union Carbide, and four of the latter's wholly owned subsidiary corporations had conspired to restrain and to monopolize, had monopolized, and had attempted to monopolize commerce in ferro-vanadium and vanadium oxide. One of the allegations was that Continental had been eliminated from the Canadian market where it formerly sold Van-Ex, a compound of vanadium oxide and other materials. Canada's entry into World War II prompted the Canadian government to control strategic materials available to Canadian private industry engaged in the war effort. The Office of Metals Controller was established and given broad powers to regulate the procurement of materials and to allocate them to industrial users. The Metals Controller enlisted the aid of Electro Met of Canada, a subsidiary of Union Carbide, in early 1943 and delegated to it discretionary agency powers to

purchase and allocate to Canadian industries all vanadium products required by them.

The District Court rejected plaintiff's offer of proof that Electro Met of Canada had actually excluded it from Canada under the control and direction of Union Carbide for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry. The Court of Appeals affirmed. The theory in the District Court and the Court of Appeals was that the action was that of the Canadian government and therefore immune.

This Court reversed, holding that plaintiff's offer of proof should have been accepted. Canadian law did not require discriminatory purchasing and there was no defense Electro Met's behavior was countenanced by Canadian law. Mr. Justice White, writing for this Court, said that *Noerr* was "plainly inapposite," 370 U.S. at 707. The opinion said of *Noerr*:

> . . . [T]he Court ruled the defendants' activities to be outside the ban of the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S., at 138. In this case, respondents' conduct is wholly dissimilar to that of the defendants in *Noerr*. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely impinge upon any of the constitutionally protected freedoms spoken of in *Noerr*. 370 U.S. at 707-708.

The decisions of this Court plainly demonstrate that there is no general immunity for all attempts to influence official action. *Noerr* creates an immunity for efforts to secure or oppose legislation. *Pennington* finds an immunity for attempts to persuade executive officers to take actions within their lawful discretion. At the other end of the spectrum, *Walker* holds that advancing claims known to be baseless in court may be the basis for liability, and *Continental Ore* attaches liability for conspiring with an agent of government to take action not within his lawful discretion.

The case now before this Court, we submit, is governed by *Walker*. Respondents' complaint alleges that Petitioners urged baseless claims before courts and administrative tribunals, and that they did so with the purpose and effect of suppressing competition. *Walker* is squarely on point and makes such conduct cognizable under Section 2 of the Sherman Act.

Litigation now in process in lower courts and litigation to come in the future will, however, disclose a wide variety of other attempts to influence official action or to employ governmental procedures for the purpose of injuring competitors. It will be useful, therefore, to examine some of the factors that we believe should govern the outcome of such cases.

IV.

THE CONSTITUTIONAL AND POLICY CONSIDERATIONS THAT GOVERN THE APPLICATION OF ANTITRUST LAW TO ATTEMPT TO USE OR ABUSE GOVERNMENTAL PROCESSES DEMONSTRATE THAT RESPONDENTS' COMPLAINT STATES A VALID CLAIM FOR RELIEF

The case now before this Court and all cases involving attempts to invoke governmental processes necessarily implicate profound values of a democratic system of government. But those values do not, as Petitioners appear to believe, all press in one direction. There is the need, as *Noerr* fully recognized, that citizens have the widest latitude in bringing their views, information, and desires to the attention of their representatives. That need, of course, finds recognition and protection in the First Amendment to the Constitution. But there is also the correlative need that government be able to protect the integrity of its processes, that it be able to punish those who would abuse them. The power of government to do that is inherent and has never been doubted. It finds recognition not merely in cases such as *Walker*, decisions finding federal power to protect federal agents and functions, but also in countless ways, such as the power of governmental agencies to punish perjury and false affidavits, to summon witnesses, and so on.

Because there is a degree of tension between these constitutional values the cases involving attempts to use governmental processes for private gain will lie along a spectrum from the completely punishable to the completely immune. To lump all cases under either category would deny the needs of government and the values protected by our Constitution. We attempt in this section of our brief to discuss the considerations that seem proper in placing various situations on

the spectrum and determining the liability or immunity of those who misuse governmental procedures. We can offer no single bright line that disposes easily of all cases, dropping them neatly into one category or another. Reflection convinces us that no such line exists. But the factors that do control are sufficient, we submit, to offer the degree of certainty and predictability the field requires.

The opinion below by the Court of Appeals for the Ninth Circuit suggests that a line be drawn between attempts improperly to influence governmental bodies whose functions are essentially legislative or representational (in which latter category the Court includes law enforcement officers) and those whose functions are essentially adjudicative. The Court of Appeals decided that the need for uninhibited communication *Noerr* perceived with respect to representational bodies or officials does not exist to the same extent with respect to adjudicative bodies. It noted that "There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with the effective performance of their respective functions." *Trucking Unlimited* v. *California Motor Transport Co.*, 432 F.2d 755, 759, n.6 (9th Cir. 1970).

There is, we believe, much to this insight, but we suggest that it may be refined and taken further. The nature of the governmental body is not alone the decisive factor, which is perhaps just as well since there are many governmental bodies whose "nature" on the representative-adjudicative continuum it would be difficult to state with confidence.

We suggest that the following five factors are prominent among those which determine the liability of persons charged with improper attempts to employ the coercive powers of government for wrongful ends and that they will usually be decisive: (1) The intent of the parties; (2) the means em-

ployed; (3) the character of the governmental process involved; (4) the character of the decision to be made; and (5) the degree to which the process focusses upon the formulation of general rules or upon the specific rights or liabilities of particular parties. Obviously, not all of these factors need point to liability for it to be proper in a particular case. The attempt to bribe a legislator to vote for a general rule of law, for example, is clearly punishable, even though the setting is legislative and the rights of a specific person are not directly involved.

We will discuss each of these factors in turn to illustrate their application to the problem.

(1) The Intent of the Parties.

Liability will usually attach only if the parties attempting to use government for their own ends have a specific intent which would render their behavior unlawful had they chosen other means of accomplishing their ends. When the sanctions invoked against such persons arise from the antitrust laws, as in the case now before this Court, there must be an intent to suppress competition by the destruction or harassment of business rivals. But a specific intent, in the sense of an ultimate purpose which is wrongful, will not be essential in all types of cases. Sometimes the employment of wrongful means, the factor to be discussed next, will suffice. Thus, one who commits perjury or attempts to bribe an official may be punished even though his ultimate purpose, the result he seeks, may be described as laudable. For antitrust cases, however, it is difficult to imagine a situation in which a specific intent to monopolize or restrain trade would not be an essential element of the case.

(2) The Means Employed.

Regardless of intent, parties can be held liable only if they

employ means of influencing governmental action that are in themselves illegal or reprehensible. Here, Petitioners are alleged deliberately to have agreed to press baseless oppositions to applications for operating rights before courts and before administrative tribunals, and they are alleged to have done what they agreed to do. Had they employed other means (e.g., individually opposing applicants only where the Petitioner in opposition had reasonable cause for his position) there could have been no Sherman Act liability. Similarly, the knowing use of perjured testimony or the bribery of an executive officer would subject the party engaging in such conduct to liability.

The use of illegal or reprehensible means of influencing government is perhaps a necessary condition for liability but it is not a sufficient one. *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961), demonstrates the truth of that proposition. The railroads there employed tactics that were certainly unethical, including the formation of sham citizens groups which put out statements and material that were actually prepared by the railroads and their public relations agency as if they were the product of the citizens groups. These misrepresentations were, nonetheless, immunized because they occurred in an explicitly political context. Thus, the character of the process in which the use of reprehensible tactics occurs affects the question of liability. We turn to this factor next.

(3) The Character of the Governmental Process Involved.

The more open, informal, and explicitly political is the governmental process the conspirators use, the greater is the scope of their immunity for reprehensible tactics intended to injure or destroy rivals. The *Noerr* case dealt with the employment of a completely political process and the conspirators' immunity was, therefore, complete. Even the use of mis-

representations was held not to destroy immunity, and that decision was clearly demanded by the philosophy of the First Amendment in order to allow free play to the rough-and-tumble political struggles characteristic of democracy.

As the governmental process of information gathering and decision-making becomes more formalized, moves more toward the model of judicial decision-making, the immunity of the conspirators correspondingly begins to narrow. If, in the context of the dispute disclosed in *Noerr*, the Pennsylvania legislature had decided to get at the merits of the controversy by establishing a legislative investigating committee, the scope of the conspirators' immunity would have been considerably reduced. Constitutional considerations would not have prevented the punishment of any industry representative who, testifying under oath before the committee, made misrepresentations of the sort contained in the publicity campaign. When the legislature creates a fact-finding process fashioned after the judicial model — with witnesses, oaths, cross-examination, a written record, and the like — it becomes correspondingly able to punish deliberate falsehoods and other abuses of its process that would be immune in the regular political arena. It hardly requires saying, of course, that the creation of a fact-finding committee does not displace the general political arena and that immunity the conspirators enjoy there continues.

We have seen that law may punish those who knowingly advance baseless claims in court, and it is undisputed that the legislature may punish those who lie to its investigative committees. What these situations have in common is a formalized process by which judicial or legislative tribunals attempt to find facts. Both courts and legislative committees may have the lawful power to make policy judgments, but that does not make everything that is said to them, no matter

how groundless or false, immune. The distinction is essential. Our society requires a wide open political process, robust and free. It also requires that there be more formal, constrained procedures for the establishment of certain types of facts and the application of policies. Processes of the latter type must be guarded from abuse if they are to be effective. To say that everything that is said to any kind of tribunal is "political expression" and therefore unregulable is to "politicalize" the courts, legislative fact-finding committees, and administrative tribunals so that they lose much of their present value and may become unmanageable. This is the reason that the character of the decision-making process that government employs affects the scope of conspirators' immunity from liability.

Petitioners have attempted to wrap the cloak of the First Amendment about their agreement to advance baseless claims before courts and administrative tribunals. It is a very poor fit. It is utterly incongrous that Petitioners should attempt to rely on such cases as *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967); and *United Transportation Union* v. *State Bar of Michigan*, 39 U.S.L.W. 4428 (U.S. April 5, 1971), to justify their squalid little commercial conspiracy. If *Button* controls this case, every abuse of the procedures of courts and administrative tribunals is "political expression" and sanctified. We do not believe the cases will bear any such construction.

In *Button* the NAACP had organized in order to advance the constitutional rights of Negroes in the federal courts as well as to see that Negroes' legal rights were protected in practice. That purpose was held essentially "political" and the state was unable to interfere with it through laws about

the relationship of lawyers and their clients. *Button* fell within the area protected by the First and Fourteenth Amendments to the Constitution.

There is no way Petitioners can make their alleged conduct look like the conduct of the NAACP in *Button*. They were not organized to advance legitimate constitutional claims, nor was their purpose to protect the procedural rights of large truckers to fair trials. To make *Button* resemble this case one would have to change its facts completely and imagine that the NAACP had decided to advance the welfare of Negroes by threatening the white employers in an area with continual lawsuits, whether there was a valid claim or not, until, from sheer economic coercion, the employers agreed to practice reverse job discrimination and to pay blacks more than whites. That abuse of judicial processes, involving the advancing of baseless claims in order to destroy and coerce men economically, would certainly not have merited or received the constitutional protection that was in fact accorded to the legitimate use of litigation in *NAACP* v. *Button*.

Petitioners' reliance upon the labor union cases is equally misplaced. This Court held only that workingmen had a right to band together to obtain competent legal counsel to press their claims. There was not a breath of a suggestion that they had a right to band together to press baseless claims for the ulterior purpose of making employers give way on wage bargaining. Yet Petitioners are charged with conduct like the latter.

The character and form of a governmental process, then profoundly affects the use that may legitimately be made of it. Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right to make deliberate misrepresentations to such tribunals or to press baseless claims for the ulterior purpose of wreaking eco-

nomic injury upon a competitor. *Button* and the labor union cases would have come out differently if that had been what they involved.

(4) The Character of the Governmental Decision.

The character of the decision that government must make will, of course, greatly influence the character of the process that is employed. But this relationship is not neat and invariable. Sometimes, for example, an executive officer is entrusted with what amounts to legislative discretion, as was the Secretary of Labor whose discretion to impose minimum wage standards was involved in *Pennington*. In such cases, no particular form of process may be specified, and the official is properly free to arrive at his conclusions in the manner that he finds most expeditious. If he acts within the area of his lawful discretion, no court will interfere, and no court will impose liability, under the Sherman Act or any other statute, upon those who attempt by lawful means to persuade him to take one decision rather than another.

But when the official, agency, or tribunal has circumscribed powers of decision, courts may invalidate actions that are outside the area of discretion and may impose liability upon those who knowingly and wrongfully induce action that is beyond the power of the agency of government involved. The classic example, of course, is the bribery of an official to take unlawful actions, but there are a variety of other situations in which there is no immunity for attempts wrongfully to influence governmental action.

This topic appears to be closely related to the political question problem so frequently raised in constitutional law. Indeed, it appears that the two problems are rooted in the same policy grounds and should find similar solutions. When Chief Justice John Marshall laid the foundations of the political question doctrine in *Marbury* v. *Madison*, 1 Cranch 137

(1803), he made a distinction that is fully applicable to many issues of liability for attempts to influence governmental action: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined." 1 Cranch at 170. So here, it is not by the "nature" of the arm of government that decides, but by the character of the decision to be made, that the decision of liability for those who seek to invoke the action of an agency of government is to be determined.

If the agency of government in question has no authority to do what it is used for, those who procure such action, knowing the limits of authority and with wrongful intent, may properly be held liable. Two illustrations of differing nature come to mind. We may hypothesize a combination of automobile dealers in a city who are upset by the aggressive competition of one dealer. That dealer makes a practice of acquiring and reselling to the public makes and models of automobiles for which he is not franchised. Under the Sherman Act the manufacturer who does franchise him may not penalize him for this practice. His rivals, however, induce an employee of the state's department of motor vehicles to harass this dealer until he stops selling makes for which he is not franchised, and this is done even though the department of motor vehicles has been given no authority over such questions whatever. Here a government official is acting in an area where he has no power to act, deciding issues of competition that he has no authority to decide. Courts may properly restrain him and, provided the requisite knowledge and intent are proved, may hold liable under the Sherman Act those who induced the action.

The second illustration is of a slightly different nature but its outcome should be the same. Suppose that a large chain

of motion picture theatres decides to block the access of rivals to towns where it has the only theatre, and to that end it adopts the tactic of opposing the construction of any additional theatres before the local zoning boards and of pursuing such opposition through all state courts. The zoning boards, under state law, have no authority to consider the desirability of competition but may only consider effects upon surrounding residential property, the capacity of the streets to handle increased traffic flow, and like matters. The motion picture chain, though it has absolutely no interest in such issues and no legal right to raise them, nevertheless battles through the zoning board and all state courts, striving for as much delay and expense at each stage as possible. Here no governmental agency is induced to take action that is outside its discretion, but the procedures of the zoning boards and the courts are invoked merely to create expense and delay in order to postpone or prevent the appearance of competition. If a would-be entrant could prove that it had been delayed by the invocation of the board procedures, that it had suffered heavy expense, that the opposition was sham and without merit and put up in bad faith for the sole purpose of monopolizing, then, we submit, there would be no doubt that the entrant would have a valid claim under Section 2 of the Sherman Act. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), holds as much. The character of the decision the tribunal is empowered to make is quite different from the effect the predator seeks by misusing the tribunal.

The *Noerr* opinion suggested that even an approach to a legislative body might subject predators to liability if the apparent effort to influence the legislators was a clear sham and engaged in only to inflict harm upon business rivals. That is a possibility the Court was wise to keep in reserve. It is far clearer that sham approaches to judicial and administrative

tribunals with the intention only of inflicting competitive injury should constitute offenses under the Sherman Act.

(5) The Degree to which the Process Invoked Focusses Upon the Formulation of General Rules or Upon the Specific Rights and Liabilities of Particular Parties.

Immunity is properly broader when the framing of general rules is the object of a governmental process than when the force of government is to be brought to bear upon the specific rights of particular parties. This factor overlaps and complements the others, but we believe it has weight of its own.

In part, this consideration parallels the distinction between legislative and judicial functions, but it has application in other contexts where persons attempt to influence official action. Citizens groups, for instance, frequently meet with police officials to make known their desires with respect to law enforcement policy, and it would be unthinkable that an individual citizen could be held liable for the motives which underlay his urging of a general policy or even for misrepresentations about the seriousness of the situation. But when the discussion narrows and begins to focus upon action to be taken against an individual, the immunity of the person who urges the police to act begins correspondingly to narrow. If one person tells what he knows or thinks he knows about another, he is surely safe. But no one would urge that a person is immune from prosecution who improperly, whether by falsely representing facts or by bribery or by other reprehensible means, induces the police to arrest and imprison his personal enemies or business rivals.

Perhaps one reason this factor is important is that processes which focus upon the individual party have a far greater capacity to hurt than do processes aimed at the formulation of general rules. Even when there is nothing to the case asserted against him, the individual person or firm forced to

fight a baseless claim is required to expend time and money. In many cases the cost may keep the party out of the market altogether. In others, the price of buying delay is worth it to the predator who reaps noncompetitive profits in the meantime. Such results are less likely when the governmental process aims at general rule making. Thus, the predator in *Walker* was able to force its victim to defend an expensive patent litigation. The same result could not have been achieved had the predator attempted to obtain from Congress a favorable change in the patent laws. The very generality of the proposal would have attracted the interested participation of many persons, in and out of Congress, so that the burden of fighting the issue would not have fallen upon a single victim.

It is true that courts and administrative tribunals often formulate general rules in the course of deciding particular controversies and the rights and liabilities of individuals. Indeed, Petitioners here rely upon that truism in an effort to convert their harassment of smaller truckers into a large-spirited effort to discuss general policy. This argument, too, is a sham. There comes a time when, after repeated unsuccessful attempts to get a judicial or administrative tribunal to adopt a policy one wants, it must be admitted that the law is otherwise. Courts, particularly in their function of interpreting and applying the Constitution, formulate broad policies. It is legitimate for persons dissatisfied with a particular formulation to hope that the courts will alter their view and overrule it. That possibility has led many persons, and even state and local governments, to resist the law of the Constitution as announced by this Court. The problem has been acute in issues of racial segregation in public schools. But there comes a time when, at last, one must accept the fact that the law is otherwise than one would wish it and cease resistance to it. As Professor Herbert Wechsler has said,

"When that chance [of a change in policy] has been exploited and has run its course with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting upon repeated litigation? The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue." Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001, 1008 (1965).

On a more mundane level one could not endlessly sue one's neighbor for nuisance because of the noise his children made playing in their backyard on the ground that the facts had not changed but that one is entitled perpetually to hope for a judicial alteration of tort law. At some point the pretense of using the individual case as a vehicle for seeking new general rules must be recognized for what it is, the deliberate harassment of a private party. At that point the neighbor can secure an injunction against further harassing litigation on the same issue and damages for the tort of malicious litigation.

So it is here. Petitioners cannot excuse an agreement to fight every application for operating rights on the ground that they were incorrigible optimists and believed that every case might alter general policy. It is alleged that some of their oppositions were utterly baseless, without any chance of success, and they knew it. At that point, they were abusing the processes of law in order to run rivals out of business. At that point, at the latest, liability under the Sherman Act set in.

CONCLUSION

Looked at from any viewpoint, Respondents' complaint states a claim upon which relief may be granted. The Sherman Act clearly applies. The statute's text, legislative his-

tory, and consistent course of interpretation show that it applies to any attempt to monopolize no matter how accomplished. The abuse of governmental processes is a modern and particularly dangerous form of predation. Section 2 of the Sherman Act clearly applies to it unless profound policy considerations, rooted in the Constitution, forbid that application.

The extremes of liability and immunity are marked by this Court's decisions in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961). The spectrum of cases falling between these extremes is calibrated by policy considerations ultimately rooted in constitutional considerations. We have attempted to spell out five factors that control the issue of liability or immunity in this class of cases.

We think there is little doubt about the case now before this Court. It is covered directly by the precedent of the *Walker* case. There, too, the allegation was that a baseless claim had been urged for the purpose of injuring competition, and this Court held that allegation to state a claim under Section 2 of the Sherman Act if the other elements of the offense were made out. A trial in this case may disclose other indicia of wrongful intent and knowing abuse of process.

The case being litigated by *amici* in the federal District Court for the District of Connecticut contains even stronger allegations. Each of the five criteria discussed indicates liability there if the allegations are proved. In our case there can be no contention that the state court or the local zoning board had any authority whatever to consider the desirability of competition. Connecticut law is explicitly to the contrary. We allege that competitive shopping centers have asserted baseless claims, as in the *Walker* case, claims that they have no

standing or lawful right to litigate. But the assertion of such claims in opposition to a zone reclassification imposes delay and expense upon *amici* and may ultimately defeat their efforts to establish a shopping center.

We respectfully urge the Court to take this opportunity to spell out the guidelines for future litigation of this sort, and we suggest that the five criteria discussed should be prominent among those controlling. While there must be free play for the political process to operate, even when the participants are governed by nothing but the crassest self-interest, there must also be preserved the integrity of other processes that are not, and should not be, fully political. An appreciation of the requirements of the effective functioning of democratic government as well as the effectiveness of antitrust policy requires no less.

Respectfully submitted,

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